Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case Number: 13638/2013

In the matter between:

TRESSO TRADING 490 (PROPRIETARY) LIMITED t/a NEXXUS CORPORATION Applicant

and

ORION COLD STORAGE (PROPRIETARY) LIMITED Respondent

JUDGMENT DELIVERED ON 24 MARCH 2014

ZONDI, J:

[1] This is an application for the provisional winding-up of the respondent on the ground that it is unable to pay its debts within the meaning of s 344 (f) of the Companies Act, 61 of 1973 read together with s 9 of Schedule 5 of the Companies Act, 71 of 2008. The respondent's alleged indebtedness to the applicant arises from 132 containers of frozen chicken products which the applicant alleges it sold to the respondent on 30 November 2012. In the alternative, the applicant seeks judgment against the respondent in the amount of R4 591 978.73.

[2] The respondent opposes the application. It denies that it is indebted to the

applicant. It avers that at all material times it acted as agent of Central Grain and not as principal. As to the applicant's alternative claim for judgment for the payment of the sum of R4 591 978.73 the respondent contends that such a claim is incompetent and amounts to an abuse of the Court process in view of the fact that the applicant's claim is *bona fide* disputed.

[3] The amount claimed by the applicant is part of the purchase price of R14.4 million for 132 containers of chicken products which the applicant alleges it sold and delivered to the respondent in or about November / December 2012. According to the applicant this consignment had originally been intended for sale and export to a Zimbabwean company called Central Grain trading as Deepcatch, which for some reason became unable to proceed with the sale transaction. In terms of the sale agreement as pleaded by the applicant the respondent was to pay R14 463 221.75 for the consignment and the purchase price was payable in three equal instalments. The first instalment would be due one month after the "*transfer in bond*" from the applicant to the respondent had been effected. The second instalment would be due one month after the first instalment, and the third instalment one month after the second. The applicant was to retain ownership of the products until the purchase price had been paid in full.

[4] The applicant contends that the respondent acted as a purchaser, not as agent of a third party in concluding the agreement for the sale of chicken products. In support of this averment the applicant refers to, and relies, on the two sales confirmations documents ("AM2" and "AM3") which it issued for the delivery of 32 containers, which the respondent had onsold to Chester Meat Wholesalers for R3 376 000 and for the remaining containers. These two sales confirmations according to the applicant were

signed on behalf of the respondent on 11 December 2012 by its logistics manager, Mr Jumat.

[5] Although the respondent admits to signing the relevant sales confirmations, it contends that it did so as an agent for Central Grain. The respondent alleges that Mr Mapolie ("Mapolie") of the applicant was aware that if the chicken products were invoiced to Central Grain, this would alert the Customs and Excise Officials to the existence of the scheme by which chickens were exported to Zimbabwe at an understated value. It avers that the two sales confirmations were signed in error by Jumat. It contends he should have signed them as the agent of Central Grain, not the buyer. How this alleged error came about is, however, not explained by the respondent and for this reason it should be accepted that the relevant sales confirmations were signed by Jumat who had the necessary authority to do so.

[6] It is, however, common cause that delivery of the consignment to the respondent was effected by the applicant by issuing "*transfer of ownership*" letters for custom purposes. The first letter was issued on 5 December 2012 with regard to the 100 containers stored with Commercial Cold Store and the second on 7 December 2012 in respect of the 32 containers stored with Sequence Cold Store.

[7] Thereafter, on 4 January 2013, the applicant sent the respondent VAT invoices in respect of the consignment. This is not denied by the respondent although it contends that Mapolie was at all times aware that Central Grain was in fact the purchaser of the goods and that it was liable for payment. The respondent alleges that Central Grain sought its assistance to obtain the release of the chicken from the applicant and to dispose of the stock on its behalf in South Africa, in order to conceal

the identity of the true purchaser of the chicken from the Zimbabwean authorities. This suggestion is denied by the applicant. It alleges that when it came to its attention during January 2013 that Central Grain was taking the position that it had sold the consignment to the respondent and was accordingly intending to invoice the respondent, the applicant informed the respondent that the respondent was liable for the payment for the consignment as it was sold to it, not to Central Grain.

[8] In this regard the applicant refers to the email it forwarded on 9 January 2013 to Mr Baker and Gaertner of the respondent. The email reads:

> "*Andy, as mentioned on the phone, I have spoken to Patrick of Orion and have confirmed with him as follows:*
>
> *Tresso Trading 490 (Pty) Ltd t/a Nexxus Corporation has legally imported the stock in question into South Africa. A customs bond transfer was effected to Orion Cold Storage for a total of 100 Containers of Chicken Backs & and Carcasses. Orion has accepted the transfer of these good and valid tax invoices has been raised against them. Terms of the agreement has been 1/3 to be paid on 30 days from Invoice (due 9th January 2013), 1/3 to be paid on 60 days from Invoice, and 1/3 to be paid on 90 days from invoice.*
>
> *Patrick has advised that he has received an invoice from Deep Catch and have been requested to pay funds over to them. This unfortunately cannot happen legally. The correct flow of funds is from Orion Cold Storage to Nexxus against valid invoices and transfers. Any other manner of transacting would open up a while set of issues with regards to South African Revenue Services and as well as Foreign Exchange control through the Reserve Bank. Our auditors are Deloitte, and they are very stringent on their reporting standards and we do not wish to be involved in any complicated issues that could lead to investigations*

in South Africa.

Please kindly instruct Orion Cold Store to release the funds that are due to Nexxus so payment can be made today, failing that we will have to issue a letter of demand to them.

Patrick has come to the rescue on this whole deal and it would not be fair to place them in the middle of this as they have nothing to do with the entire deal from the beginning.

Thanks in advance for your speedy action."

[9] It is common cause that by March 2013 the respondent had not paid the first instalment. The applicant had to write to the respondent demanding payment of the instalment that had become due. The respondent failed to comply with the demand. Again on 14 March 2013 the applicant sent an email to the respondent enquiring about payment. In reply thereto the respondent by email ("AM18"), also dated 14 March 2013, informed the applicant:

"*For our records I would like these docs before the 2nd payment falls due please – or earlier should customs require it. I think that's more than reasonable.*

First payment is scheduled for tomorrow – Sat at the latest. As per my agreement with Jared, here is the breakdown.

NEXXUS INVOICE		*R14 463 221.75*
Storage up to 14/02		*-R2 710 793.00*
		R11 752 428.75
	Overdue invoices Deepcatch	*R3 331 508.00*
		R8 420 920.75
Payment	*15-Mar*	*R2 806 973.58*

15-Apr			*R2 806 973.58*
14-May			*R2 806 973.58*
	Invoice	*Date*	
	2202523	*08/02/2013*	*R686 333.00*
	2202568	*19/02/2013*	*R53 820.00*
	2202569	*19/02/2013*	*R51 940.00*
	2202579	*20/02/2013*	*R667 046.00*
	2202587	*22/02/2013*	*R413 600.00*
	2202636	*06/03/2013*	*R434 770.00*
	2202649	*07/03/2013*	*R206 110.00*
	2202665	*08/03/2013*	*R180 500.00*
	2202696	*13/03/2013*	*R475 920.00*
	2202696	*13/03/2013*	***R3 170 039.00***

UHT Milk in Store	*dc order 903 214 dd 23/08/2012*	*R161 469.00*
	dc order 903 213 dd 23/08/2012	*R161 469.00*
Total Goods supplied in lieu of payment		*R3 331 508.00*
		==========

Regards"

[10] The applicant did not receive payment from the respondent as undertaken by it on 14 March 2013. A meeting was held between Mapolie and Gaertner on 29 April 2013 to discuss payment. The parties reached an agreement, full details of which were confirmed by Mapolie in the email dated 29 April 2013. The email ("AM19") reads:

"*I refer to our meeting at your premises this morning.*

As discussed and agreed the transaction between Deep Catch Namibia and Orion Cold Store really has nothing to do with the stock sold to Orion by Nexxus. Legally the offsetting between the accounts is not correct despite the fact that Jared tried to assist the matter by buying stock from Orion. However, as a gentleman's agreement and understanding it has been agreed that Orion

will hold back an amount of circa R4million until DC Namibia pays Orion. DC Namibia will be instructed to pay up to the Orion Account as soon as possible so the balance of the monies can be transferred to Nexxus.

Orion is also disputing an amount of circa R2million for storage that will be handled as a separate matter.

It was further agreed that this leaves an amount of ±R8.6million that is currently not under dispute. Patrick has agreed that Orion will transfer stock back to Nexxus (unknown amount) and that the balance of what is outstanding of the ±R8.6million will be paid in parts after the stock value has been deducted. The payment will be structured as follows:

1/3 Payable Friday 03/05/2013

1/3 Payable Friday 10/05/2013

1/3 Payable Friday 17/05/2013

Patrick, please can you urgently confirm the quantum of the containers that will be transferred and their reference numbers so we can arrange for the XRW's to be cancelled by our clearing agent. Also, as per your commitment this morning please kindly do not disappoint us on the payment I am counting on your word.

Sirs whilst it pains me to do business in this way I will agree to these terms as I would like to reach an amicable agreement on this so we can all move on with our lives. I must re-iterate at this stage that whatever business dealing there are between Nexxus and DC Zimbabwe does not involve Orion and we will resolve these matters between us.

Patrick please can you kindly concur that that above is what have been agreed."

[11] Pursuant to the agreement reached on 29 April 2013, the respondent

transferred to the applicant ownership of 32 containers on 9 May 2013, in respect of which the respondent's account was credited in the amount of R3 593 800. In terms of this agreement the storage costs as well as standing time invoice were to be handled separately.

[12] The respondent denies that it is indebted to the applicant in the amount claimed by it. Its version is that the purchase and sale of the 132 containers of frozen chicken was not a transaction between the applicant and the respondent, but was in fact between the applicant and Central Grain of Zimbabwe. The respondent alleges that the applicant and Central Grain did a great deal of business over a long period of time in respect of the importation into Zimbabwe of perishable goods from South America. The applicant would attend to the import of these perishable goods on behalf of Central Grain, utilising a company called Mega Freight as its clearing agent. The goods would be placed in cold storage for the account of the applicant. Central Grain had a running account with the applicant and the importation of the 132 containers was only part of a much more extensive course of dealing. It is further alleged by the respondent that due to the tighter boarder controls in Zimbabwe and substantially higher import tariffs for chicken, imports of chicken into Zimbabwe virtually stopped overnight. The effective smuggling of thousands of tons of chicken across the South African/Zimbabwean boarder came to an end. This sequence of events resulted in a huge build-up of chicken products in cold stores in Durban as the orders from South America could not be cancelled. Large volumes of chicken products had already been shipped to Durban or were on route and in many cases prepaid.

[13] The respondent explains that it was against this background that it was approached by Central Grain to attempt to dispose of chicken product which was

stored on its behalf in Durban and in respect of which it was incurring substantial storage costs with the applicant. It alleges that the conclusion of this particular transaction was facilitated by Jared Geyser of an entity called Deepcatch in Namibia with whom the respondent had had various dealings in the past. It was on that basis that the respondent concluded an agreement with Central Grain in terms of which it would endeavour to market and dispose of the chicken products on its behalf. It avers that it was agreed with Central Grain that the respondent would account to Central Grain for the proceeds. The respondent emphasises that at all times it acted as the agent of Central Grain. At no stage was it the purchaser of the chicken products from the applicant and the applicant was aware that the respondent was acting on behalf of Central Grain in concluding the transaction for the purchase of 132 containers of frozen chicken.

[14] The respondent further alleges that Central Grain was represented by Mr Sonnie Roussouw and Mr Andrew Baker in concluding the agreement. According to the respondent the applicant was paid in full by Central Grain in respect of the perishable products purchased from the applicant over the period between 10 April 2012 and 20 May 2013. In support of this averment the respondent refers to, and relies on, a spread sheet prepared by the applicant which reflects all the transactions between applicant and Central Grain from 26 October 2012, which the respondent contends serves to prove that the applicant was paid in full. The respondent further points out that the agreement between the applicant and Central Grain was that the respondent as an agent of Central Grain would make monthly payments during March, April and May to the applicant from the funds derived from the sale of the chicken. These are the amounts referred to in the email of 14 March 2013 (“AM18”) as being payable on 15 March 2013, 15 April 2013 and 14 May 2013. But it says it could not

pay on the agreed dates because it did not hold sufficient funds on behalf of Central Grain. It points out that subsequent to this arrangement Central Grain instructed the respondent not to make payments to the applicant as Central Grain had by then already paid the applicant in full.

[15] As far as the allegation that the respondent is factually insolvent is concerned, the respondent denies that it is insolvent and in support of the denial it refers to its audited annual financial statement for the year ended 28 February 2013. From the statement it appears that the respondent has a retained income of R21 406 121; its current assets amount to R50 861 921; its turnover for the relevant period was over R142 million and its current assets exceed its current liabilities by over R20 million.

[16] The question is whether the applicant has, in light of the respondent's averments forming basis of its defence, made out a *prima facie* case against the respondent. The determination of this question is important because winding-up proceedings ought not to be resorted to in order to enforce payment of a debt the existence of which is *bona fide* disputed by the company on reasonable grounds; the procedure for winding-up is not designed for the resolution of dispute as to the existence or non-existence of a debt. (*Hülse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane & Fey NNO Intervening)* 1998 (2) SA 208 (C) at 219 E-J; *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T); *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 956 I-J; *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabric (Pty) Ltd and Another Intervening)* 1978 (1) SA 70 (D) at 72A). This is so because motion proceedings such as these are aimed at the resolution of legal issues based on common cause facts. They are simply not geared toward the decision of factual disputes. As a result it is well established

that, where in motion proceedings disputes of fact arise on the papers, the matter can only be decided on the respondent's version of the disputed facts, unless that version is so far-fetched or clearly untenable that it can justifiably be rejected merely on the papers. It makes no difference to this approach that motion proceedings have been dictated by the legislature. *(Oakdene Square Properties (Pty) Ltd and Other v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) para 3). Respondent in a liquidation application who disputes the applicant's claim does not have to establish that the company will succeed in any action which might be brought against it by the applicant to enforce its disputed claim. All that is required of the respondent is to allege facts which, if put at trial, would constitute a good defence to the applicant's claim. Where the application is opposed as in this case, and the factual disputes have been raised in the affidavits in deciding whether or not the applicant has made out a *prima facie* case, regard should be had not only to the applicant's papers but also to the respondent's rebutting evidence (*Kalil v Decotex (Pty) Ltd supra* at 976H).

[17] What emerges from the respondent's defence is that the applicant had a long trading relationship with Central Grain which carried on a business of importing perishable goods from South America. The purchase of the 132 containers of frozen chicken was not a transaction between the applicant and the respondent but between the applicant and Central Grain. And that because of the tighter boarder controls in Zimbabwe and substantially higher import tariffs for chicken, there was a large build-up of chicken products in cold stores in Durban as orders from South America could not be cancelled. An agreement was concluded between the respondent and Central Grain in terms of which the respondent would endeavour to dispose of the frozen chicken on its behalf. The respondent alleges that at no stage was it the purchaser of

frozen chicken from the applicant. In terms of an agreement concluded with the applicant and Central Grain, the respondent, as the agent of Central Grain would make payments to the applicant with funds derived from the sale of the chicken and that these payments would be made between March and May 2013. Chicken to the value of R3 331 508 would be supplied to Deepcatch. The value of frozen chicken supplied to Deepcatch would be deducted from the amount owing by the respondent to Central Grain. It is further alleged that the applicant has been paid in full by Central Grain for the consignment of 132 containers of frozen chicken purchased by it. The respondent has filed a supporting affidavit deposed to by one Roussouw of Central Grain confirming the nature of relationship between it and the respondent as regards the purchase of the relevant chicken products.

[18] The respondent in its defences raises at least three issues which in my view are of fundamental importance. The first is whether the respondent is commercially and/or factually insolvent; secondly, is the capacity in which the respondent acted in concluding the agreement for the sale of 132 containers of chicken with the applicant; and thirdly, is whether Central Grain on whose behalf the respondent allegedly acted in concluding the transaction, has paid the applicant in full for the consignment. The parties are sharply divided on these issues.

[19] Regarding the respondent's factual insolvency as a ground for the provisional winding-up of the respondent, I am not satisfied, having regard to the content of the respondent's audited annual financial statement, that the applicant has established a *prima facie* case based on that ground. It is clear from the respondent's relevant financial statement that the respondent's current assets exceed its current liabilities by over R20million and it has a retained income of R21 406 124. In the circumstances

there can be no basis for the contention that the respondent is factually insolvent. I am also not satisfied that the applicant has established commercial insolvency on the part of the respondent as explained by Caney J in Rosenbach and Co. (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) 593 (D). The respondent denies that it is indebted to the applicant in the amount claimed. It sets out facts on which its denial is founded and the facts underlying its defence cannot be said to be far-fetched to justify their rejection merely on the papers. The grounds on which the respondent contends that it is not indebted to the applicant raise a serious challenge to the applicant's claim that the respondent is commercially insolvent. It is clear therefrom that the respondent's indebtedness to the applicant is being *bona fide* disputed on reasonable grounds (*Badenhorst supra* at 347H – 348B). In other words, it refuses to pay. (*Absa Bank v Rhebokskloof (Pty) Ltd & Others* 1993 (4) SA 436 (C)).

[20] At the commencement of his argument Mr **Olivier,** who appeared for the applicant, submitted in the alternative on authority of *Kalil v Decotex supra* at 981 D, that in the event of the Court finding that the probabilities are evenly balanced in regard to the factual disputes, the Court should order that the matter be referred for hearing of oral evidence. He submitted that the present case was a proper case for a referral to oral evidence. He advanced two reasons for his contention. First, he argued that the respondent had admitted that it is indebted in the amount claimed by the applicant. In this regard he referred to "*AM18*" which he argued establishes the respondent's indebtedness to the applicant and how that indebtedness was to be paid. He argued that it was clear from this document that the applicant's initial invoice of R14 463 221.75 was not disputed. Secondly, he argued that the respondent never disputed the correctness of the manner in which payment was to be made as set out in the email ("AM19") addressed by the applicant to the respondent on 29 April 2013, to

which the respondent did not reply. He pointed out that prior to the institution of these proceedings at no stage did the respondent inform the applicant that it had been acting on behalf of Central Grain in the transaction. Mr **Olivier** submitted that the respondent, by failing to dispute the correctness of the assertions contained in the letter of 29 April 2013, must be taken to have admitted them. As authority for this proposition he referred to *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) 10D-H. The request for the matter to be referred to oral evidence was strongly objected to by Mr **Woodland** on behalf of the respondent, who argued that it would result in a matter being heard on a piece-meal basis. He submitted that the applicant should not have brought this application because it should have been aware that there was going to be a dispute of fact as the respondent disputed the debt on *bona fide* and reasonable ground.

[21] I am not satisfied that the applicant has established a *prima facie* case for the relief it seeks. The probabilities are evenly balanced. The question is whether I should exercise my discretion and refer the matter to oral evidence on disputed issues as requested by the applicant. It is correct that an application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the Court on the papers. (*Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA) para 23; *De Reske v Maras and Others* 2006 (1) SA 401 (C) paras 32 – 33). In the latter case the *dicta* in *Kalil v Decotex, supra* at 981 F and in *Adminstrator Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 200C were referred to with approval.

[22] In view of the fact that the probabilities are evenly balanced in this matter, I shall accede to the applicant’s request and refer the matter to oral evidence. I say the

probabilities are evenly balanced for the following reasons, (some of which are in favour of the applicant and others against it). First, when the respondent signed the sales confirmations and the letters of transfer of ownership in respect of the consignment it did not inform the applicant that it was doing so as an agent of Central Grain. Secondly, when the respondent sought to withhold payment it did not state that it was doing so because of the fact that the monies were not due to the applicant or that payment was due by Central Grain or that Central Grain was to have placed the respondent in funds. Thirdly, the respondent did not dispute the correctness of the averments which the applicant made in the email of 29 April 2013. The applicant therefore did not know nor could it anticipate before instituting these proceedings what the respondent's defence would be. On the other hand, the respondent's claim that it acted on behalf of Central Grain may not be without foundation. There is a reference to Jarred of Deepcatch in the respondent's email of 14 March 2013 ("AM18"). Jarred is alleged to have given instruction to the respondent on how to calculate the quantum of the amount owing to the applicant and how it was to be paid. Finally, the respondent's allegation that Central Grain had made part-payment to the applicant is not disputed by the latter which, in my view, supports the respondent's version that the agreement was primarily between the applicant and Central Grain and that it (the respondent) only acted as the agent of the latter.

[23] In fact the applicant concedes that it received pre-payments from Central Grain for the relevant chicken products although it avers that those payments did not result, nor were they intended to result, in the transfer of ownership. But the applicant's explanation as to what the payments were intended for, is irrelevant. What is important is that Central Grain did make some payments to the applicant and these payments were not taken into account by the applicant in calculating the total amount claimed.

The nature of these payments and the extent to which they would have affected the quantum of the applicant's claim should have been disclosed by the applicant.

[24] In the light of these facts this case is in my view, a proper case for the referral of the matter to oral evidence.

[25] In the result I make an order in the following terms:

1. The application is postponed to a date to be arranged by the Registrar of this Court for the hearing of viva voce evidence.

2. The issues to be resolved at such hearing are:

    2.1 whether the applicant is a creditor of the respondent; and, if so,

    2.2 whether the respondent had given an undertaking on 29 April 2013 to pay the applicant.

3. The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided below.

4. Save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless –

    4.1 it has served on the other party, at least fourteen[14] days before the date appointed for hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or

4.2 the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

4.3 Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

4.4 The fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

4.5 Within thirty [30] days of the making of this order, each of the parties shall make discovery on oath, of all documents relating to the issues referred to above, which documents are, or have at any time been, in possession or under control of such party.

4.6 Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

4.7 The costs of the hearing of the application are to be determined by the Court which hears the postponed application.

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JUDGE OF THE HIGH COURT